

**SEMINARIO DI
DIRITTO INTERNAZIONALE PENALE**

LEZIONE 3

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1. FORME DI RESPONSABILITÀ PENALE INTERNAZIONALE DELL'INDIVIDUO

Judgment of International Military Tribunal – Nuremberg:

“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”

a) Responsabilità diretta

Principi di diritto internazionale riconosciuti nella Carta del Tribunale di Norimberga e nella sentenza del Tribunale:

“Principle 1: Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment”

b) Joint criminal enterprise

Prosecutor v. Tadic (TPIY – Camera d’Appello), Judgment, 15 luglio 1999:

“227. In sum, the objective elements (*actus reus*) of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows:

i. *A plurality of persons.* They need not be organised in a military, political or administrative structure, as is clearly shown by the *Essen Lynching* and the *Kurt Goebell* cases.

ii. *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.

iii. *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.

228. By contrast, the *mens rea* element differs according to the category of common design under consideration. With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which, as noted above, is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused’s position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk.*”

Prosecutor v. Krstic (TPIY - Camera d’Appello), Judgment, 2 agosto 2001:

“643. It seems clear that “accomplice liability” denotes a secondary form of participation which stands in contrast to the responsibility of the direct or principal perpetrators. The Trial

Chamber is of the view that this distinction coincides with that between “genocide” and “complicity in genocide” in Article 4(3).”

c) Istigazione

***Prosecutor v. Kordic et al.* (TPIY – Camera di prima istanza), Judgment, 26 febbraio 2001:**

“387. ... instigating “entails ‘prompting another to commit an offence’.” Both positive acts and omissions may constitute instigation, but it must be proved that the accused directly intended to provoke the commission of the crime. Although a causal relationship between the instigation and the physical perpetration of the crime needs to be demonstrated (i.e., that the contribution of the accused in fact had an effect on the commission of the crime), it is not necessary to prove that the crime would not have been perpetrated without the accused’s involvement.”

d) Aiding and abetting

***Prosecutor v. Kristic* (TPIY – Camera di prima istanza), Judgment, 2 agosto 2001:**

“601. ...“Aiding and abetting” means rendering a substantial contribution to the commission of a crime”

***Prosecutor v. Akayesu* (TPIR – Camera di prima istanza), Judgment, 2 settembre 1998:**

“484. Article 6 (1) declares criminally responsible a person who "(...) or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 (...)". Aiding and abetting, which may appear to be synonymous, are indeed different. Aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto. The issue here is to whether the individual criminal responsibility provided for in Article 6(1) is incurred only where there was aiding and abetting at the same time. The Chamber is of the opinion that either aiding or abetting alone is sufficient to render the perpetrator criminally liable. In both instances, it is not necessary for the person aiding or abetting another to commit the offence to be present during the commission of the crime.”

***Prosecutor v. Furundzija* (TPIY – Camera di prima istanza), Judgment, 10 dicembre 1998:**

“249. ... the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the actus reus consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The mens rea required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the actus reus consists of participation in a joint criminal enterprise and the mens rea required is intent to participate.”

e) Command responsibility

=> **Giurisprudenza dei tribunali militari alleati dopo la seconda guerra mondiale:**

Responsabilità penale dei superiori gerarchici:

***United States of America v. Yamashita* (Corte Suprema degli Stati Uniti), 4 febbraio 1946:**

il generale Yamashita aveva “an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population”.

***United States of America v. List et al.* (“*The Hostages Case*”) (Tribunale Militare degli Stati Uniti - Norimberga):** “corps commander must be held responsible for the acts of his

subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about.”

(al contrario della sentenza *Yamashita*, l’obiettivo conoscenza di diffuse atrocità non fu considerata sufficiente ad imputare una conoscenza soggettiva del crimine, a meno che il superiore non avesse concrete informazioni circa quelle atrocità)

Responsabilità penale dei superiori gerarchici civili:

***United States of America v. von Weizsaecker (“The Ministries Case”)* (Tribunale Militare degli Stati Uniti - Norimberga):** “Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations”.

=> Giurisprudenza del TPIY e del TPIR:

1^a ipotesi: il superiore viola un obbligo di non fare (es. un superiore che impartisce un ordine illegale): il superiore gerarchico è responsabile a prescindere dalla sua qualifica, in quanto il diritto internazionale penale non esige qualità particolari in capo a colui che abbia commesso un crimine internazionale; la condizione di superiore gerarchico di colui che ha commesso l’infrazione non è né un elemento costitutivo dell’infrazione né una condizione sufficiente all’imputabilità. La qualità di superiore gerarchico, nella misura in cui essa facilita la commissione del crimine, può essere considerata come un’aggravante e interviene nell’apprezzamento del *quantum* della pena.

2^a ipotesi: il superiore viola un obbligo di fare: sono due i criteri per determinare se egli è responsabile penalmente per la condotta dei suoi subordinati:

un superiore ha conoscenza o ha ragione di conoscere, nelle circostanze del momento, che il subordinato sta commettendo o sta sul punto di commettere un crimine. Questo criterio indica che il superiore gerarchico può avere la *mens rea* richiesta per incorrere nella responsabilità penale in due differenti situazioni. Nella prima situazione, “ha conoscenza” di un crimine o di un possibile crimine ma non agisce, egli è considerato un complice del suo subordinato nella commissione del crimine. Nella seconda situazione, “ha ragione di conoscere”, in quanto in possesso di rilevanti informazioni, che il suo subordinato sta commettendo o è sul punto di commettere un crimine, e ignora tali informazioni, egli è responsabile penalmente per negligenza, essendo venuto meno al suo dovere di prevenire o reprimere ogni condotta illegale acquisendo ogni informazione necessaria che lo metta in grado di adottare azioni appropriate.

Conoscenza:

Prosecutor v. Kordic and Cerkez (TPIY – Camera di prima istanza), Judgment, 26 febbraio 2001: “428. Depending on the position of authority held by a superior, whether military or civilian, de jure or de facto, and his level of responsibility in the chain of command, the evidence required to demonstrate actual knowledge may be different. For instance, the actual knowledge of a military commander may be easier to prove considering the fact that he will presumably be part of an organised structure with established reporting and monitoring systems. In the case of de facto commanders of more informal military structures, or of civilian leaders holding de facto positions of authority, the standard of proof will be higher”

Perché il superiore incorra nella responsabilità penale, egli deve avere avuto la competenza legale per adottare le misure per prevenire o reprimere il crimine e avere avuto la possibilità materiale di adottare tali misure.

Controllo:

***Prosecutor v. Delalic et al. ("Celebici Camp")*, (TPIY – Camera d'Appello), Judgment, 20 febbraio 2001:** “197. In general, the possession of de jure power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power prima facie results in effective control unless proof to the contrary is produced”.

***Prosecutor v. Kordic and Cerkez*, (TPIY – Camera di prima istanza), Judgment, 26 febbraio 2001:** “402. The factor that determines superior responsibility is the actual possession, or non-possession of effective powers of control, in the sense that the superior must be found to have the material ability to prevent and punish the commission of crimes by subordinates

***Prosecutor v. Delalic et al. ("Celebici Camp")* (TPIY – Camera d'Appello, Judgment, 20 febbraio 2001:** “266. The Appeals Chamber considers, therefore, that customary law has specified a standard of *effective* control, although it does not define precisely the means by which the control must be exercised. It is clear, however, that substantial influence as a means of control in any sense which falls short of the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions. Nothing relied on by the Prosecution indicates that there is sufficient evidence of State practice or judicial authority to support a theory that substantial influence as a means of exercising command responsibility has the standing of a rule of customary law, particularly a rule by which criminal liability would be imposed.”

Nesso di causalità:

***Prosecutor v. Delalic et al. ("Celebici Camp")*, (TPIY – Camera di prima istanza), Judgment, 16 novembre 1998:** “400. ... *no such casual link can possibly exist between an offence committed by a subordinate and the subsequent failure of a superior to punish the perpetrator of that same offence. The very existence of the principle of superior responsibility for failure to punish, therefore, recognised under Article 7(3) and customary law, demonstrates the absence of a requirement of causality as a separate element of the doctrine of superior responsibility*”.

Nell'ambito della gerarchia militare, anche un soldato semplice, che ha ai suoi ordini un piccolo gruppo di uomini, può rispondere dei crimini commessi dai suoi subordinati.

Possono essere ritenuti responsabili per lo stesso crimine anche due superiori, contemporaneamente, se l'autore è ai loro ordini.

=> Articolo 28 Statuto della CPI:

L'articolo 28 disciplina la responsabilità dei capi militari e di altri superiori gerarchici. Questa disposizione significativa per tutti i reati di cui all'articolo 5 dello Statuto della CPI completa l'articolo 25, par. 3, lett. b, dello Statuto secondo cui è punibile chi fra l'altro «ordina» un reato. La disposizione distingue fra «comandanti militari» (e persone che ne fanno le veci), da una parte, e tutti gli altri «superiori gerarchici» militari e civili, dall'altra. La responsabilità del comandante militare è più grave di quella degli altri superiori gerarchici:

- la responsabilità militare del comandante o della persona che ne fa effettivamente le veci, si estende ai crimini commessi da forze poste sotto il suo effettivo comando e controllo o sotto la sua effettiva autorità e controllo quando non abbia esercitato un opportuno controllo su queste forze. La responsabilità ricade su un tale comandante allorquando quest'ultimo sapeva o, date le circostanze, avrebbe dovuto sapere che le forze commettevano o stavano per commettere tali crimini, e ha tralasciato di prendere tutte le misure necessarie e ragionevoli per impedirne l'esecuzione o per sottoporre la questione alle autorità competenti per il perseguimento penale.

- il concetto di «altri superiori gerarchici» comprende tutti i superiori gerarchici civili. Include però anche i superiori militari che non dispongano di autorità di comando o che hanno ai loro ordini dei civili. Per essere punibili, questi «altri superiori gerarchici» dovevano sapere che i propri subalterni commettevano o stavano per commettere reati oppure avere deliberatamente trascurato informazioni che riguardavano palesemente tali atti. Lo Statuto esige inoltre che gli atti criminali dei subalterni rientrino nella sfera di competenza per la quale il superiore gerarchico è responsabile. A giusta ragione questa condizione non è richiesta nel caso di un comandante militare: infatti, se le altre condizioni sono soddisfatte, può essere ritenuto responsabile anche per reati commessi dai suoi sottoposti al di fuori della sua sfera di competenza, come per esempio durante la libera uscita.

2. ESERCITAZIONE

ESAME DI ALCUNE FORME DI RESPONSABILITÀ PENALE PER ATTI DI GENOCIDIO

Complicity in Genocide

TPIR, *Prosecutor v. Akayesu* (Camera di prima istanza), Judgment, 02.09.1998

525. Under Article 2(3)e) of the Statute, the Chamber shall have the power to prosecute persons who have committed complicity in genocide. The Prosecutor has charged Akayesu with such a crime under count 2 of the Indictment.

526. Principle VII of the "Nuremberg Principles" [103](#) reads

"complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law."

Thus, participation by complicity in the most serious violations of international humanitarian law was considered a crime as early as Nuremberg.

527. The Chamber notes that complicity is viewed as a form of criminal participation by all criminal law systems, notably, under the Anglo-Saxon system (or Common Law) and the Roman-Continental system (or Civil Law). Since the accomplice to an offence may be defined as someone who associates himself in an offence committed by another [104](#), complicity necessarily implies the existence of a principal offence. [105](#)

528. According to one school of thought, complicity is borrowed criminality' (criminalité d'emprunt). In other words, the accomplice borrows the criminality of the principal perpetrator. By borrowed criminality, it should be understood that the physical act which constitutes the act of complicity does not have its own inherent criminality, but rather it borrows the criminality of the act committed by the principal perpetrator of the criminal enterprise. Thus, the conduct of the accomplice emerges as a crime when the crime has been consummated by the principal perpetrator. The accomplice has not committed an autonomous crime, but has merely facilitated the criminal enterprise committed by another.

529. Therefore, the issue before the Chamber is whether genocide must actually be committed in order for any person to be found guilty of complicity in genocide. The Chamber notes that, as stated above, complicity can only exist when there is a punishable, principal act, in the commission of which the accomplice has associated himself. Complicity, therefore, implies a predicate offence committed by someone other than the accomplice.

530. Consequently, the Chamber is of the opinion that in order for an accused to be found guilty of complicity in genocide, it must, first of all, be proven beyond a reasonable doubt that the crime of genocide has, indeed, been committed.

531. The issue thence is whether a person can be tried for complicity even where the perpetrator of the principal offence himself has not being tried. Under Article 89 of the Rwandan Penal Code, accomplices

"may be prosecuted even where the perpetrator may not face prosecution for personal reasons, such as double jeopardy, death, insanity or non-identification"[unofficial translation].

As far as the Chamber is aware, all criminal systems provide that an accomplice may also be tried, even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be proven.

532. The Chamber notes that the logical inference from the foregoing is that an individual cannot thus be both the principal perpetrator of a particular act and the accomplice thereto. An act with which an accused is being charged cannot, therefore, be characterized both as an act of genocide and an act of complicity in genocide as pertains to this accused. Consequently, since the two are mutually exclusive, the same individual cannot be convicted of both crimes for the same act.

533. As regards the physical elements of complicity in genocide (*Actus Reus*), three forms of accomplice participation are recognized in most criminal Civil Law systems: complicity by

instigation, complicity by aiding and abetting, and complicity by procuring means¹⁰⁶. It should be noted that the Rwandan Penal Code includes two other forms of participation, namely, incitement to commit a crime through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, and complicity by harbouring or aiding a criminal. Indeed, according to Article 91 of the Rwandan Penal Code:

"An accomplice shall mean:

1. A person or persons who by means of gifts, promises, threats, abuse of authority or power, culpable machinations or artifice, directly incite(s) to commit such action or order(s) that such action be committed.
2. A person or persons who procure(s) weapons, instruments or any other means which are used in committing such action with the knowledge that they would be so used.
3. A person or persons who knowingly aid(s) or abet(s) the perpetrator or perpetrators of such action in the acts carried out in preparing or planning such action or in effectively committing it.
4. A person or persons who, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings or through the public display of placards or posters, directly incite(s) the perpetrator or perpetrators to commit such an action without prejudice to the penalties applicable to those who incite others to commit offences, even where such incitement fails to produce results.
5. A person or persons who harbour(s) or aid(s) perpetrators under the circumstances provided for under Article 257 of this Code."¹⁰⁷ [unofficial translation]

534. The Chamber notes, first of all, that the said Article 91 of the Rwandan Penal Code draws a distinction between "*instigation*" (instigation), on the one hand, as provided for by paragraph 1 of said Article, and "*incitation*" (incitement), on the other, which is referred to in paragraph 4 of the same Article. The Chamber notes in this respect that, as pertains to the crime of genocide, the latter form of complicity, i.e. by incitement, is the offence which under the Statute is given the specific legal definition of "direct and public incitement to commit genocide," punishable under Article 2(3)c), as distinguished from "complicity in genocide." The findings of the Chamber with respect to the crime of direct and public incitement to commit genocide will be detailed below. That said, instigation, which according to Article 91 of the Rwandan Penal Code, assumes the form of incitement or instruction to commit a crime, only constitutes complicity if it is accompanied by, "gifts, promises, threats, abuse of authority or power, machinations or culpable artifice"¹⁰⁸. In other words, under the Rwandan Penal Code, unless the instigation is accompanied by one of the aforesaid elements, the mere fact of prompting another to commit a crime is not punishable as complicity, even if such a person committed the crime as a result.

535. The ingredients of complicity under Common Law do not appear to be different from those under Civil Law. To a large extent, the forms of accomplice participation, namely "aid and abet, counsel and procure", mirror those conducts characterized under Civil Law as "l'aide et l'assistance, la fourniture des moyens".

536. Complicity by aiding or abetting implies a positive action which excludes, in principle, complicity by failure to act or omission. Procuring means is a very common form of complicity. It

covers those persons who procured weapons, instruments or any other means to be used in the commission of an offence, with the full knowledge that they would be used for such purposes.

537. For the purposes of interpreting Article 2(3)e) of the Statute, which does not define the concept of complicity, the Chamber is of the opinion that it is necessary to define complicity as per the Rwandan Penal Code, and to consider the first three forms of criminal participation referred to in Article 91 of the Rwandan Penal Code as being the elements of complicity in genocide, thus:

- complicity by procuring means, such as weapons, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose;
- complicity by knowingly aiding or abetting a perpetrator of a genocide in the planning or enabling acts thereof;
- complicity by instigation, for which a person is liable who, though not directly participating in the crime of genocide, gave instructions to commit genocide, through gifts, promises, threats, abuse of authority or power, machinations or culpable artifice, or who directly incited to commit genocide.

538. The intent or mental element of complicity implies in general that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offence. In other words, the accomplice must have acted knowingly.

539. Moreover, as in all criminal Civil law systems, under Common law, notably English law, generally, the accomplice need not even wish that the principal offence be committed. In the case of National Coal Board v. Gamble¹⁰⁹, Justice Devlin stated

"an indifference to the result of the crime does not of itself negate abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third lives or dies and interested only the cash profit to be made out of the sale, but he can still be an aider and abettor."

In 1975, the English House of Lords also upheld this definition of complicity, when it held that willingness to participate in the principal offence did not have to be established¹¹⁰. As a result, anyone who knowing of another's criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence.

540. As far as genocide is concerned, the intent of the accomplice is thus to knowingly aid or abet one or more persons to commit the crime of genocide. Therefore, the Chamber is of the opinion that an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.

541. Thus, if for example, an accused knowingly aided or abetted another in the commission of a murder, while being unaware that the principal was committing such a murder, with the intent to destroy, in whole or in part, the group to which the murdered victim belonged, the accused could be prosecuted for complicity in murder, and certainly not for complicity in genocide. However, if the accused knowingly aided and abetted in the commission of such a murder while he knew or had reason to know that the principal was acting with genocidal intent, the accused would be an accomplice to genocide, even though he did not share the murderer's intent to destroy the group.

542. This finding by the Chamber comports with the decisions rendered by the District Court of Jerusalem on 12 December 1961 and the Supreme Court of Israel on 29 May 1962 in the case of Adolf Eichmann¹¹¹. Since Eichmann raised the argument in his defence that he was a "small cog" in the Nazi machine, both the District Court and the Supreme Court dealt with accomplice liability and found that,

"[...] even a small cog, even an insignificant operator, is under our criminal law liable to be regarded as an accomplice in the commission of an offence, in which case he will be dealt with as if he were the actual murderer or destroyer".¹¹²

543. The District Court accepted that Eichmann did not personally devise the "Final Solution" himself, but nevertheless, as the head of those engaged in carrying out the "Final Solution" - "acting in accordance with the directives of his superiors, but [with] wide discretionary powers in planning operations on his own initiative," he incurred individual criminal liability for crimes against the Jewish people, as much as his superiors. Likewise, with respect to his subordinates who actually carried out the executions, "[...] the legal and moral responsibility of he who delivers up the victim to his death is, in our opinion, no smaller, and may be greater, than the responsibility of he who kills the victim with his own hands"¹¹³. The District Court found that participation in the extermination plan with knowledge of the plan rendered the person liable "as an accomplice to the extermination of all [...] victims from 1941 to 1945, irrespective of the extent of his participation"¹¹⁴.

544. The findings of the Israeli courts in this case support the principle that the *mens rea*, or special intent, required for complicity in genocide is *knowledge* of the genocidal plan, coupled with the *actus reus* of participation in the execution of such plan. Crucially, then, it does not appear that the specific intent to commit the crime of genocide, as reflected in the phrase "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such," is required for complicity or accomplice liability.

545. In conclusion, the Chamber is of the opinion that an accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

546. At this juncture, the Chamber will address another issue, namely that which, with respect to complicity in genocide covered under Article 2(3)(e) of the Statute, may arise from the forms of participation listed in Article 6 of the Statute entitled, "Individual Criminal Responsibility," and more specifically, those covered under paragraph 1 of the same Article. Indeed, under Article 6(1), "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime." Such forms of participation, which are summarized in the expression "[...] or otherwise aided or abetted [...]," are similar to the material elements of complicity, though they in and of themselves, characterize the crimes referred to in Articles 2 to 4 of the Statute, which include namely genocide.

547. Consequently, where a person is accused of aiding and abetting, planning, preparing or executing genocide, it must be proven that such a person acted with specific genocidal intent, i.e. the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, whereas, as stated above, there is no such requirement to establish accomplice liability in genocide.

548. Another difference between complicity in genocide and the principle of abetting in the planning, preparation or execution a genocide as per Article 6(1), is that, in theory, complicity requires a positive act, i.e. an act of commission, whereas aiding and abetting may consist in failing to act or refraining from action. Thus, in the Jefferson and Coney cases, it was held that "The accused [...] only accidentally present [...] must know that his presence is actually encouraging the principal(s)"¹¹⁵. Similarly, the French Court of Cassation found that,

"A person who, by his mere presence in a group of aggressors provided moral support to the assailants, and fully supported the criminal intent of the group, is liable as an accomplice"¹¹⁶[unofficial translation].

The International Criminal Tribunal for the Former Yugoslavia also concluded in the Tadic judgment that :

"if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it."¹¹⁷

Direct and Public Incitement to commit Genocide

TPIR, *Prosecutor v. Akayesu (Camera di prima istanza)*, Judgment, 02.09.1998

“549. Under count 4, the Prosecutor charges Akayesu with direct and public incitement to commit genocide, a crime punishable under Article 2(3)(c) of the Statute.

550. Perhaps the most famous conviction for incitement to commit crimes of international dimension was that of Julius Streicher by the Nuremberg Tribunal for the virulently anti-Semitic articles which he had published in his weekly newspaper *Der Stürmer*. The Nuremberg Tribunal found that: "Streicher's incitement to murder and extermination, at the time when Jews in the East were being killed under the most horrible conditions, clearly constitutes persecution on political and racial grounds in connection with War Crimes, as defined by the Charter, and constitutes a Crime against Humanity". [118](#)

551. At the time the Convention on Genocide was adopted, the delegates agreed to expressly spell out direct and public incitement to commit genocide as a specific crime, in particular, because of its critical role in the planning of a genocide, with the delegate from the USSR stating in this regard that, "It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so and unless the crimes had been premeditated and carefully organized. He asked how in those circumstances, the inciters and organizers of the crime could be allowed to escape punishment, when they were the ones really responsible for the atrocities committed". [119](#)

552. Under Common law systems, incitement tends to be viewed as a particular form of criminal participation, punishable as such. Similarly, under the legislation of some Civil law countries, including Argentina, Bolivia, Chili, Peru, Spain, Uruguay and Venezuela, provocation, which is similar to incitement, is a specific form of participation in an offence [120](#); but in most Civil law systems, incitement is most often treated as a form of complicity.

553. The Rwandan Penal Code is one such legislation. Indeed, as stated above, in the discussion on complicity in genocide, it does provide that direct and public incitement or provocation is a form of complicity. In fact, Article 91 subparagraph 4 provides that an accomplice shall mean " A person or persons who, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings or through the public display of placards or posters, directly incite(s) the perpetrator or perpetrators to commit such an action without prejudice to the penalties applicable to those who incite others to commit offences, even where such incitement fails to produce results". [121](#)

554. Under the Statute, direct and public incitement is expressly defined as a specific crime, punishable as such, by virtue of Article 2(3)(c). With respect to such a crime, the Chamber deems it appropriate to first define the three terms: incitement, direct and public.

555. Incitement is defined in Common law systems as encouraging or persuading another to commit an offence [122](#). One line of authority in Common law would also view threats or other forms of pressure as a form of incitement [123](#). As stated above, Civil law systems punish direct and public incitement assuming the form of provocation, which is defined as an act intended to directly provoke another to commit a crime or a misdemeanour through speeches, shouting or threats, or any other means of audiovisual communication [124](#). Such a provocation, as defined under Civil law, is made up of the same elements as direct and public incitement to commit genocide covered by Article 2 of the Statute, that is to say it is both direct and public.

556. The public element of incitement to commit genocide may be better appreciated in light of two factors: the place where the incitement occurred and whether or not assistance was selective or limited. A line of authority commonly followed in Civil law systems would regard words as being public where they were spoken aloud in a place that were public by definition [125](#). According to the International Law Commission, public incitement is characterized by a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television [126](#). It should be noted in this respect that at the time Convention on Genocide was adopted, the delegates specifically agreed to rule out the possibility of including private incitement to commit genocide as a crime, thereby underscoring their commitment to set aside for punishment only the truly public forms of incitement [127](#).

557. The "direct" element of incitement implies that the incitement assume a direct form and specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement¹²⁸. Under Civil law systems, provocation, the equivalent of incitement, is regarded as being direct where it is aimed at causing a specific offence to be committed. The prosecution must prove a definite causation between the act characterized as incitement, or provocation in this case, and a specific offence¹²⁹. However, the Chamber is of the opinion that the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as "direct" in one country, and not so in another, depending on the audience¹³⁰. The Chamber further recalls that incitement may be direct, and nonetheless implicit. Thus, at the time the Convention on Genocide was being drafted, the Polish delegate observed that it was sufficient to play skillfully on mob psychology by casting suspicion on certain groups, by insinuating that they were responsible for economic or other difficulties in order to create an atmosphere favourable to the perpetration of the crime.¹³¹

558. The Chamber will therefore consider on a case-by-case basis whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.

559. In light of the foregoing, it can be noted in the final analysis that whatever the legal system, direct and public incitement must be defined for the purposes of interpreting Article 2(3)(c), as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.

560. The *mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

561. Therefore, the issue before the Chamber is whether the crime of direct and public incitement to commit genocide can be punished even where such incitement was unsuccessful. It appears from the *travaux préparatoires* of the Convention on Genocide that the drafters of the Convention considered stating explicitly that incitement to commit genocide could be punished, whether or not it was successful. In the end, a majority decided against such an approach. Nevertheless, the Chamber is of the opinion that it cannot thereby be inferred that the intent of the drafters was not to punish unsuccessful acts of incitement. In light of the overall *travaux*, the Chamber holds the view that the drafters of the Convention simply decided not to specifically mention that such a form of incitement could be punished.

562. There are under Common law so-called inchoate offences, which are punishable by virtue of the criminal act alone, irrespective of the result thereof, which may or may not have been achieved. The Civil law counterparts of inchoate offences are known as [*infractions formelles*] (acts constituting an offence *per se* irrespective of their results), as opposed to [*infractions matérielles*] (strict liability offences). Indeed, as is the case with inchoate offenses, in [*infractions formelles*], the method alone is punishable. Put another way, such offenses are "deemed to have been consummated regardless of the result achieved [*unofficial translation*]"¹³² contrary to [*infractions matérielles*]. Indeed, Rwandan lawmakers appear to characterize the acts defined under Article 91(4) of the Rwandan Penal Code as so-called [*infractions formelles*], since provision is made for their punishment even where they proved unsuccessful. It should be noted, however, that such offences are the exception, the rule being that in theory, an offence can only be punished in relation to the result envisaged by the lawmakers. In the opinion of the Chamber, the fact that such acts are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results, warrants that they be punished as an exceptional measure. The Chamber holds that genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator."

Conspiracy to Commit Genocide

TPIR, *Prosecutor v. Musema* (Camera di prima istanza), Judgment and Sentence, 27.01..2000

“Article 2(3)(b) of the Statute provides that the Tribunal shall have the power to prosecute persons charged with the crime of conspiracy to commit genocide. The Prosecutor has charged the Accused with such a crime under Count 3 of the Indictment.

184. The Chamber notes that the crime of conspiracy to commit genocide covered in the Statute is taken from the Genocide Convention. The "*Travaux Préparatoires*" of the Genocide Convention suggest that the rationale for including such an offence was to ensure, in view of the serious nature of the crime of genocide, that the mere agreement to commit genocide should be punishable even if no preparatory act has taken place⁽²⁷⁾. Indeed, during the debate preceding the adoption of the Convention, the Secretariat advised that, in order to comply with General Assembly resolution 96 (I), the Convention would have to take into account the imperatives of the prevention of the crime of genocide:

"This prevention may involve making certain acts punishable which do not themselves constitute genocide, for example, certain material acts preparatory to genocide, an agreement or a conspiracy with a view to committing genocide, or systematic propaganda inciting to hatred and thus likely to lead to genocide."⁽²⁸⁾

186. The Chamber notes that Common Law systems tend to view "*entente*" or conspiracy as a specific form of criminal participation, punishable in itself. Under Civil Law, conspiracy or "*complot*" derogates from the principle that a person cannot be punished for mere criminal intent ("*résolution criminelle*") or for preparatory acts committed. In Civil Law systems, conspiracy (*complot*) is punishable only where its purpose is to commit certain crimes considered as extremely serious, such as, undermining the security of the State.

187. With respect to the constituent elements of the crime of conspiracy to commit genocide, the Chamber notes that, according to the "*Travaux Préparatoires*" of the Genocide Convention, the concept of conspiracy relied upon the Anglo-Saxon doctrine of conspiracy. In its Report, the Ad hoc Committee states that conspiracy "is a crime under Anglo-American law": Ad Hoc Committee Report (1948) 8. This reflected the assumptions made during debates on conspiracy. The French representative initially observed that conspiracy was a foreign concept to French law. The US representative, speaking as Chair, explained that "in Anglo-Saxon law 'conspiracy' was an offence consisting in the agreement of two or more persons to effect any unlawful purpose".⁽²⁹⁾ Venezuela's representative later remarked that in Spanish the word "conspiracy" meant a conspiracy against the Government and that the English term "conspiracy" was rendered in Spanish by "*asociación*" (association) for the purpose of committing a crime.⁽³⁰⁾ The representative of Poland observed that in Anglo-Saxon law the word "complicity" extended only to "aiding and abetting" and that the offence described as "conspiracy" did not involve complicity. Poland recalled that the Secretariat draft made separate provision for complicity and conspiracy.⁽³¹⁾ In the Sixth Committee debates, Mr Maktos of the United States of America stated that "conspiracy" had "a very precise meaning in Anglo-Saxon law; it meant the agreement between two or more persons to commit an unlawful act".⁽³²⁾ Mr. Raafat of Egypt noted that the notion of conspiracy had been introduced into Egyptian law and "meant the connivance of several persons to commit a crime, whether the crime was successful or not".⁽³³⁾

188. For its part, the United Nations War Crimes Commission defined conspiracy as follows:

"The doctrine of conspiracy is one under which it is a criminal offence to conspire or to take part in an allegiance to achieve an unlawful object, or to achieve a lawful object by unlawful means."⁽³⁴⁾

189. Civil Law distinguishes two types of *actus reus*, qualifying two "levels" of '*complot*' or conspiracy. Following an increasing level of gravity, the first level concerns (*le complot simple*) simple conspiracy, and the second level (*le complot suivi d'actes matériels*) conspiracy followed by material acts. Simple conspiracy is usually defined as a concerted agreement to act, decided upon by

two or more persons (*résolution d'agir concertée et arrêtée entre deux ou plusieurs personnes*) while the conspiracy followed by preparatory acts is an aggravated form of conspiracy where the concerted agreement to act is followed by preparatory acts. Both forms of '*complot*' require that the following three common elements of the offence be met: (1) an agreement to act [*la résolution d'agir*];⁽³⁵⁾ (2) concerted wills [*le concert de volontés*]; and (3) the common goal to achieve the substantive offence [*l'objectif commun de commettre l'infraction principale*].

190. Under Common Law, the crime of conspiracy is constituted when two or more persons agree to a common objective, the objective being criminal.

191. The Chamber notes that the constitutive elements of conspiracy, as defined under both systems, are very similar. Based on these elements, the Chamber holds that conspiracy to commit genocide is to be defined as an agreement between two or more persons to commit the crime of genocide.

192. With respect to the *mens rea* of the crime of conspiracy to commit genocide, the Chamber notes that it rests on the concerted intent to commit genocide, that is to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. Thus, it is the view of the Chamber that the requisite intent for the crime of conspiracy to commit genocide is, *ipso facto*, the intent required for the crime of genocide, that is the *dolus specialis* of genocide.⁽³⁶⁾

193. It emerges from this definition that, as far as the crime of conspiracy to commit genocide is concerned, it is, indeed, the act of conspiracy itself, in other words, the process ("*procédé*") of conspiracy, which is punishable and not its result. The Chamber notes, in this regard, that under both Civil and Common Law systems, conspiracy is an inchoate offence ("*infraction formelle*") which is punishable by virtue of the criminal act as such and not as a consequence of the result of that act.⁽³⁷⁾

194. The Chamber is of the view that the crime of conspiracy to commit genocide is punishable even if it fails to produce a result, that is to say, even if the substantive offence, in this case genocide, has not actually been perpetrated.

195. Moreover, the Chamber raised the question as to whether an accused could be convicted of both genocide and conspiracy to commit genocide.

196. Under Civil Law systems, if the conspiracy is successful and the substantive offence is consummated, the accused will only be convicted of the substantive offence and not of the conspiracy. Further, once the substantive crime has been accomplished and the criminal conduct of the accused is established, there is no reason to punish the accused for his mere *résolution criminelle* (criminal intent), or even for the preparatory acts committed in furtherance of the substantive offence. Therefore an accused can only be convicted of conspiracy if the substantive offence has not been realized or if the Accused was part of a conspiracy which has been perpetrated by his co-conspirators, without his direct participation.

197. Under Common Law, an accused can, in principle, be convicted of both conspiracy and a substantive offence, in particular, where the objective of the conspiracy extends beyond the offences actually committed. However, this position has incurred much criticism. Thus, for example, according to Don Stuart:

"The true issue is not whether evidence has been used twice to achieve convictions but rather whether the fundamental nature of the conspiracy offence is best seen [...] as purely preventive, incomplete offence, auxiliary offence to the principal offence and having no true independent rationale to exist on its own alongside the full offence. On this view it inexorably follows that once the completed offence has been committed there is no justification for also punishing the incomplete offence."⁽³⁸⁾

198. In the instant case, the Chamber has adopted the definition of conspiracy most favourable to Musema, whereby an accused cannot be convicted of both genocide and conspiracy to commit genocide on the basis of the same acts. Such a definition is in keeping with the intention of the Genocide Convention. Indeed, the "*Travaux Préparatoires*" show that the crime of conspiracy was included to punish acts which, in and of themselves, did not constitute genocide. The converse implication of this is that no purpose would be served in convicting an accused, who has already been found guilty of genocide, for conspiracy to commit genocide, on the basis of the same acts."

3. DOCUMENTI

Statute of the International Tribunal for the former Yugoslavia

Article 7

Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Statute of the International Tribunal for Rwanda

Article 6: Individual Criminal Responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Rome Statute of the International Criminal Court

Article 25

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 28

Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.